



September 12, 2001

Mr. Charles Horner, III
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2001-4070

Dear Mr. Horner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151883.

The Texas Department of Health (the "department") received a request for information relating to a department study of multiple sclerosis ("MS") in El Paso including "any drafts, notes, comments or research related to the MS study." The requestor also asks for documents relating to a public meeting, specified contracts, and documents submitted to the Texas Legislature. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. You state that you will release all other requested information. We have considered the exception you claim and reviewed the submitted information. We have also considered the comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Initially, we note that the requestor contends that the department's request for a decision is untimely. *See* Gov't Code § 552.301(b) (providing that a governmental body must request a decision not later than the tenth business day after receipt of the written request). The requestor asserts that the department never responded to his December 21, 2000 request for the same information at issue in this ruling. Further, the requestor disputes the department's contention that the deadline was tolled as a result of a clarification on July 5, 2001. *See* Gov't Code § 552.222 (allowing governmental body to ask the requestor to clarify request if request is unclear, or narrow if request is voluminous); Open Records Decision No. 663 (1999) (providing for tolling of tenth business day deadline during clarification process).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the deadlines in section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body

demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). The department argues that the submitted information is excepted under section 552.101 of the Government Code. Section 552.101 of the Government Code provides a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Because the assertion of section 552.101 of the Government Code provides a compelling reason to overcome the presumption of openness, we need not determine whether the department failed to request a decision as required by section 552.301 of the Government Code. Accordingly, we will address your arguments under section 552.101 of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by statute. You contend that the submitted information is excepted in its entirety under section 161.0213 of the Health and Safety Code. Section 161.0213 provides as follows:

Reports, records, and information furnished to the commissioner or the commissioner's designee or the Texas Natural Resource Conservation Commission that relate to an epidemiologic or toxicologic investigation of human illnesses or conditions and of environmental exposures that are harmful or believed to be harmful to the public health are not public information under Chapter 552, Government Code, and are subject to the same confidentiality requirements as described by Section 81.046.

Health & Safety Code § 161.0213. Section 161.0213 is found in Title 2 of the Health and Safety Code. Section 11 of that code contains the pertinent definitions of terms used in Title 2. Section 11.001(2) defines "Commissioner" to mean "the commissioner of public health" and section 11.001(3) defines "department" to mean the "Texas Department of Health." Further, section 11.012(e) designates the commissioner as the executive head of the department.

The department explains that the submitted information pertains to a Health and Safety Code Chapter 161 investigation into a suspected cluster of MS cases in El Paso. *See* Health and Safety Code § 161.0211 (providing that department shall conduct epidemiologic or toxicologic investigations of human illnesses or conditions). You state that everything pertaining to the MS cluster is in the department's possession because it was furnished to the department's Bureau of Epidemiology, the commissioner's designee. You also contend that the submitted information relates to an investigation of a human illness, MS, and environmental exposures. Based on these representations and our review of the submitted

information, we conclude that you must withhold most of the submitted information under section 552.101 of the Government Code in conjunction with section 161.0213 of the Health and Safety Code. However, we conclude that a few e-mails, which we have marked, may not be withheld under sections 161.0213 or 81.046 of the Health and Safety Code because the e-mails pertain to open records requests for information concerning the investigation and, therefore, are not directly related to the investigation. Therefore, you must release the marked information, but withhold the remaining submitted information under section 552.101 in conjunction with section 161.0213 of the Health and Safety Code. Because we are able to make this determination, we need not address your remaining arguments.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

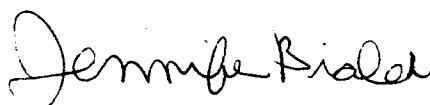
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Jennifer Bialek".

Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/sdk

Ref: ID# 151883

Enc: Marked documents

c: Mr. R. Kinnan Goleman
Brown McCarroll, L.L.P.
111 Congress Avenue, Suite 1400
Austin, Texas 78701-4043
(w/o enclosures)